warranty, *York Mfg. Co.* v. *Bonnell,* 24 Ind. App. 667; *Boyd* v. *Whitefield,* 19 Ark. 447; and in *Conestoga Cigar Co.* v. *Finke,* 144 Pa. St. 159, recovery was allowed a subvendee on a warranty of quality made by an inspector of tobacco to the vendee, because such was the general usage of the trade. But in these cases the warranty was made to the vendee, and recovery was allowed the subvendee because he was successor to the vendee's rights (except in the Pennsylvania case, where a custom was pleaded). In the instant case the warranty was not made to the vendee, but to a third person, who had an interest only because he secured the payment of part of the purchase price, and who was not a successor to the rights of the vendee in any way. Had the contract of warranty not been separable from the contract of sale, defendant's counter-claim could not have been allowed.

WATERS—EASEMENT OF UPPER PROPRIETOR—RIGHT OF LOWER OWNER TO REPEL SURFACE WATERS.—Plaintiff, the owner of land adjoining a highway, erected a dyke to prevent water from flowing from the highway on to his land. Defendant, a town controlling the highway, had the dyke cut down. In an action for damages brought against the defendant, *held,* that defendant, owner of the upper land, had no easement or servitude entitling it to discharge surface water on to the lower land. *Harvie* v. *Town of Caledonia* (Wis. 1915), 154 N. W. 383.

The question of the right to discharge surface water over the lower land is one concerning which there is much conflict of authority. There are first those decisions which follow the civil law rule. allowing the upper proprietor such a right. *Village of Trenton* v. *Rucker,* 162 Mich. 19, 127 N. W. 39; *Baltimore and S. P. Ry. Co.* v. *Hackett,* 87 Md. 224, 39 Atl. 510; *Sanguinetti* v. *Pock,* 136 Cal. 466, 69 Pac. 98; *Pinkstaff* v. *Steffy,* 216 Ill. 406, 75 N. E. 163; *Baker* v. *Town of Akron,* 145 Ia. 485, 122 N. W. 926; *Livingston v. McDonald,* 21 Ia. 160, 89 Am. Dec. 563; and *Foley* v. *Godchaux,* 48 La. Ann. 466, 19 So. 247. Secondly there are those decisions which follow the so-called common law rule that a land-owner, for the purpose of improving or cultivating his land, may raise it, or fill it in, even though the natural flow of surface water is thereby interrupted. *Barkley* v. *Wilcox,* 86 N. Y. 140, 40 Am. Rep. 519; *City of Paola* v. *Gorman,* 80 Kan. 702, 103 Pac. 83; *Chadeayne* v. *Robinson,* 55 Conn. 345. Thirdly, there are those decisions which hold that the water flowing from higher land is a common enemy and that the lower proprietor may, to prevent the flow of the water on to his land, erect any such barriers or obstructions as he may desire. This is really an extension of the so-called common law rule. *Bates* v. *Smith,* 100 Mass. 181; *Edwards* v. *Ry. Co.,* 39 S. C. 472, 18 S. E. 58; *Gross* v. *Lampasas,* 74 Tex. 195, 11 S. W. 1086; *Lessard* v. *Stram,* 62 Wis. 112; and *Bryant* v. *Merritt,* 71 Kan. 272, 80 Pac. 600 (dictum). It is this "common enemy" doctrine upon which the principal case is decided. Finally there are those decisions which say that the owner of the lower land may, by artificial means, prevent water from flowing on to his land when, considering all the circumstances, such an act would be reasonable. *Cox* v. *H. & St. J. Ry. Co.,* 174 Mo. 588, 74 S. W. 854; *Peterson* v. *Lindquist,* 106 Minn. 339, 119 N. W. 50; *Little Rock & Fort*

Smith Ry. Co. v. *Chapman,* 39 Ark. 463, 43 Am. Rep. 280; *Swett* v. *Cutts,* 50 N. H. 439, 9 Am. Rep. 276. It has been suggested that any rule on this question should make a distinction between city and rural property. See article on SURFACE WATERS in 6 MICH. L. REV. 448.

WATERS—RIGHT TO REMOVE ICE.—In an action to enjoin defendant from taking ice formed on a mill-pond, it was *held* that the title to the ice is in the owner of the soil, and not in the owner of the right to flow the land for creating water power. *Valentino* v. *Schantz et al.* (N. Y. 1915), 109 N. E. 866.

It seems to be the well-established rule that the ice formed in waters where the bed is in private ownership is the property of the owner of the soil over which it is formed. *Washington Ice Co.* v. *Shortall,* 101 Ill. 46; *State* v. *Pottmeyer,* 33 Ind. 402; *Marsh* v. *McNider,* 88 Iowa 390. This rule has been based on the theory that the ice, by being attached to the soil, became part of the realty on the theory of accretion, *Washington Ice Co.* v. *Shortall,* supra, at p. 55, and also on the principle that the owner has the same rights in the ice as in the water, that is, "the right to take the ice from the water resting upon his land." *Stevens* v. *Kelley,* 78 Me. 445, 451. It would seem that different results would flow from these theories; the first giving title in the ice, the second giving the right to a reasonable use of the ice. Where riparian owners or their predecessors in title have granted the right to flow their land by means of a dam to raise a head of water for propelling machinery, the owner of the right of flowage does not, by the prevailing rule, acquire any right to the ice which may form on the pond over the land of the riparian owners. *Julien* v. *Woodsmall,* 82 Ind. 568; *Bigelow* v. *Shaw,* 65 Mich. 341. The owner of the land flowed may use the ice adjoining his land to any extent which does not decrease the flow of water below that necessary to successfully fulfill the needs of the owner of the dam. *Eidemiller Ice Co.* v. *Guthrie,* 42 Neb. 238; *Reyson* v. *Roate,* 92 Wis. 543; *Stevens* v. *Kelley,* supra; *Searle* v. *Gardner,* 10 Sadler (Pa.) 163; *Beachwood Ice Co.* v. *American Ice Co.,* 176 Fed. 435; *Paine* v. *Woods,* 108 Mass. 160, 173; *Abbott* v. *Cremer,* 118 Wis. 377; *Cummings* v. *Barrett,* 10 Cush. 186, (semble). This rule rests on the theory that the owner of the servient estate can make any use of it not inconsistent with the easement of flowage. *Brookville & Metamora Hydraulic Co.* v. *Butler,* 91 Ind. 134, 138. The courts of New York and Connecticut formerly took the view that the owner of the mill privileges had a right to all the ice formed on the pond. *Myer* v. *Whitaker,* 5 Abb. N. C. (N. Y.) 172; *Mill River Woolen Mfg. Co.* v. *Smith,* 34 Conn. 462. These cases, however, have been questioned; *Dodge* v. *Berry,* 26 Hun (N. Y.) 246; *Howe* v. *Andrews,* 62 Conn. 398. It would seem that the principal case, being from the Court of Appeals, clearly sets forth the New York doctrine on this question, and adopts the rule which is at present universally accepted in this country.

WILLS—EFFECT OF PARTIAL CANCELLATION ON THE RESIDUE OF ESTATE.—Where the sixth paragraph and part of the tenth paragraph (the latter being the residuary clause) had been cut and removed from the will of the testa-